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IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF DELAWARE

Civil Action No. 337.

JOHN J. CASALE, INC.,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants.

JURISDICTIONAL STATEMENT UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

(Filed January 14, 1944.)

John J. Casale, Inc., plaintiff-appellant herein, presents the following statement as the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final decree of December 21, 1943, in the above-entitled cause sought to be reviewed.

A. Statutory Provisions.

The statutory provisions believed to sustain the jurisdiction of the Supreme Court are 28 U. S. C., Secs. 47(a), 345, 7 F. C. A. Title 28, Sec. 47(a), 8 F. C. A. Title 28, Sec. 345.

B. Date of the Decree Sought to Be Reviewed and Date Upon Which the Application for Appeal Was Presented.

The decree sought to be reviewed was entered December 21, 1943. The petition for appeal, together with the assignment of errors, was presented January 14, 1944, and allowed January 17, 1944.

C. Nature of the Cause and the Rulings Below.

This is an appeal from a decree of the District Court of the United States for the District of Delaware, entered December 21, 1943, dismissing an action instituted by John J. Casale, Inc., a Delaware corporation, against the United States of America and Interstate Commerce Commission for the purpose of setting aside a final order of Division 3 of that Commission dated April 8, 1943, and affirmed by the full Commission membership on August 2, 1943, denying the petition of John J. Casale, Inc., to withdraw and for that reason to dismiss, its previously filed and undisposed of application to the Commission for a contract carrier permit or for a common carrier certificate of public convenience and necessity to transport as a carrier for hire by motor vehicle property in interstate and foreign commerce. In denying such petition for withdrawal and refusing to dismiss the application because of such petition for withdrawal the Commission did not make any findings whatsoever.

The Court below held that the action of plaintiff-appellant to set aside such denial order of the Commission and for affirmative judicial relief compelling the Commission to allow withdrawal, is premature and beyond the jurisdiction of the United States District Court for the reason that the Interstate Commerce Commission may not, in its final consideration and decision on the "grandfather" applica-

tion, determine John J. Casale, Inc., to be a carrier for hire. It was said in the Court's opinion that should the Commission deny the Casale application for a common carrier certificate, or in the alternative a contract carrier permit, on the ground that John J. Casale, Inc., is not a motor carrier for hire entitled to such certificate or permit, then no harm will have been done by the refusal to permit the application for such certificate or permit to be withdrawn. If, however (it was added by the Court), it should be concluded by the Commission that John J. Casale, Inc., is a carrier for hire and accordingly a permissive certificate or permit should be issued in its favor by the Commission, then that John J. Casale, Inc., would be entitled to institute a new action in the United States District Court for the District of Delaware to set aside such permissive order of the Commission on the ground that before entering its order the Commission should have allowed the application to be withdrawn.

The Court declared that there was present a "strong" case for the right of John J. Casale, Inc., to withdraw its application to the Commission under the authority of *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, but that the District Court is presently barred from according relief on the authority of *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125.

The question therefore presented by this appeal is a substantial one. It involves the substantive duty of the Interstate Commerce Commission, upon petition to it to that effect, to allow a grandfather applicant to withdraw its application to the Commission before final action of the Commission on the application. It furth[illegible]volves the power of the United States District Court, when the Commission has refused to permit such withdrawal, to set aside the Commission's denial order and affirmatively to compel the Commission to allow the withdrawal. Since in the majority decision of the Supreme Court of the United States

in *Jones* v. *Securities & Exchange Commission* the right of withdrawal of a permissive application was held to be a substantive one, the question here is whether the Commission's refusal to permit such withdrawal, before its final action on the application, is reviewable by the U. S. Statutory District Court.

The judgment of the U. S. District Court is a final one as far as that Court is concerned.

D. Cases Sustaining the Supreme Court's Jurisdiction on Direct Appeal.

U. S. v. *B. & O. R. R. Co.*, 293 U. S. 454;
I. C. C. v. *Railway Labor Executives*, 315 U. S. 373.

E. Decree and Opinion of the District Court.

Appended to this statement is a copy of the opinion of the District Court and the final decree of the District Court sought to be reviewed. There were no separate findings of fact or conclusions of law made and entered by the District Court.

Plaintiff-appellant, therefore, respectfully submits that the Supreme Court of the United States has jurisdiction of the appeal.

Dated January 14, 1944.

(S.) CHARLES E. COTTERILL,
Attorney for Plaintiff-Appellant.

APPENDIX "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

Civil Action No. 337

JOHN J. CASALE, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Opinion.

Before Biggs and Goodrich, Circuit Judges and Leahy, District Judge, Sitting Pursuant to the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. (1940 Ed.) § 47.

(S.) GOODRICH, *Circuit Judge:*

The plaintiff, John J. Casale, Inc., hereafter called Casale, invokes the aid of a three judge court under the provisions of the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. (1940 Ed.) § 47. The facts, which have been stipulated by the parties may be briefly summarized as follows:

In 1936 Casale applied to the Interstate Commerce Commission for a "grandfather" certificate as a contract carrier as provided in the statute. 49 U. S. C. (1940 Ed.) § 309. In the application the plaintiff stated that while it carried some freight under contract its chief business was leasing trucking equipment. In 1939 Casale filed a motion to dismiss its application conditioned upon the Commission's making an entry that its rental business would not be subject to the Motor Carrier Act. In 1941 a hearing was had before a Commission examiner. Plaintiff's counsel stated on the record that Casale had already abandoned its contract carrier business and was devoting itself entirely to the leasing of trucking equipment. Evidence was offered regarding the details of plaintiff's leasing business. Subsequently, in 1941, the examiner filed a recommended

report finding that the plaintiff was engaged only in the rental business and that such business did not constitute carriage subject to the Motor Carrier statute. In 1942 the Commission, upon its own motion reopened the proceedings. Two further hearings were held before an examiner. In 1943, at the last hearing, the plaintiff's counsel asked for an unconditional dismissal of the application. This motion was denied, first by Division 5 of the Commission and subsequently by the entire Commission.

It is the denial of this motion to dismiss of which the plaintiff complains. It asks that the order of the Interstate Commerce Commission be set aside, that the Commission be enjoined from proceeding further in respect to such application and that an order be entered requiring the Commission to permit withdrawal of the application and granting the motion to dismiss.

Two questions were argued before us. One had to do with whether the denial of the motion to dismiss was proper. Casale urges that it was not, that it has a right to ask for dismissal at any time prior to the final termination of the proceedings and makes a strong argument based upon the majority opinion in Jones *v.* Securities & Exchange Commission, 298 U. S. 1 (1936). In support of its decision, counsel for the Interstate Commerce Commission and the United States point out distinctions between the situation presented here and that in the Jones case. The question is interesting and not without difficulty. We think we do not get to it as this case comes before the Court.

The reason we do not get to the question noted above is because we think the plaintiff's appeal for court help is premature. Judicial aid is invoked because of the provision of the Urgent Deficiencies Act cited above. That statute does not say, in so many words, what constitutes, for purposes of judicial review, "any order" made or entered by the Interstate Commerce Commission. But the Supreme Court has, in an illuminating group of decisions, given us guidance in determining under what circumstances judicial review may be called for. The most complete discussion is that found in Rochester Telephone Corp. *v.* United States, 307 U. S. 125 (1939). The Court lists several

s of Commission action in which judicial review was
ed. Its first is "Where the action sought to be re-
ed may have the effect of forbidding or compelling
luct on the part of the person seeking to review it, but
if some further action is taken by the Commission."
129) In such cases, says the Court, "In view of tra-
nal conceptions of federal judicial power, resort to the
ts • • • is either premature or wholly beyond their
ince" (p. 130). Examples cited are orders of the
mission setting a case for hearing despite a challenge
risdiction, United States *v.* Illinois Central Railroad
pany, 244 U. S. 82 (1917), rendering a tentative valua-
under the Valuation Act, The Delaware and Hudson
pany *v.* United States, 266 U. S. 438 (1925), or even a
valuation thereunder, United States *v.* Los Angeles &
Lake Railroad Company, 273 U. S. 299 (1927). While
discussion by the Court in the Rochester case was
arily concerned with clearing up the confusion in the
"negative orders" the classification just recited as
of the instances where court review is unavailable was
e evidently approved as well as decisions cited as in-
ces thereof.

'e think the instant case falls clearly within the classifi-
on just discussed. The case in which Casale began as
ntiff has been heard and the evidence submitted and re-
ed. A denial of the motion to dismiss does not call
n the plaintiff for anything more, forbid it to do any-
g or put it under any burden while the case is in the lap
he Commission. The situation seems to be perfectly
cribed by the language used by the Court in United
es *v.* Los Angeles & Salt Lake Railroad Company,
ra. "The so-called order here complained of is one
ch does not command the carrier to do, or refrain from
g, any thing; which does not grant or withhold any
nority, privilege or license; which does not extend or
dge any power or facility; which does not subject the
ier to any liability, civil or criminal; which does not
nge the carrier's existing or future status or condition;
ch does not determine any right or obligation" (pp.
310).

Neither the plaintiff nor this Court knows what the order of the Interstate Commerce Commission will be at the conclusion of the consideration of the case before it. If the order accords with what the plaintiff wants, obviously it has not been hurt by the Commission's refusal to dismiss. If the order goes against the plaintiff's desires and it feels aggrieved thereby, court review is open to it on the merits which will include the question of whether it has a substantive right to have its petition dismissed at its pleasure after hearings have taken place. But, at the present stage of the litigation, we are clear that the plaintiff is not entitled to relief from this Court. The prayer of the petitioner is denied; the defendants may submit a decree.

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FILED
FEB 19 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 704

JOHN J. CASALE, INC.,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

REPLY OF APPELLANT TO APPELLEES' MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

JOHN J. CASALE, INC.,
Appellant,
v.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.
No. 704

REPLY OF APPELLANT TO APPELLEES' MOTION TO AFFIRM

There is here involved the validity of another order of the Interstate Commerce Commission. The court below indicated the order probably is invalid, and could be later set aside should need arise, but considered that not yet is the matter ripe for judicial cognizance under the reviewing statute. The suit was said to be premature.

Direct appeal to this Court was, however, allowed as a matter of right under familiar provisions of the statutes governing the review of orders of the Commission. As usual counsel for the Government then interposed their motion to affirm. Their right so to file cannot be questioned by appellant of course; but this general practice of moving in this Court to affirm whenever the Government prevails in the courts below in Commission cases seems to suppose that no substantial question is ever presented here on appeals so long as the Government deems its position in the courts below was correct.

But it would seem that the procedural privilege of moving to affirm more properly should be confined in its exercise to those few instances in which it might truly be said that the issues involved are so positively required to be decided only in one way as to make the appeal virtually

frivolous. Moreover when Congress directed that appeals to this court may be taken as of right where the validity of orders of the Commission is involved more was intended than merely to serve the purpose of individual cases. It was considered important to assure comprehensiveness of devision for the further guidance of the Commission and the bar. A recent exampie was No. 105, October Term, 1943, *Eastern-Central Motor Carriers Association* v. *United States, et al.*, decided February 7, 1944.

The Broad Question Presented

Purposely the case is not here briefed in full. Only so much need here be said as replies to the motion to affirm.

This, then, is the broad and important question involved which the Government now says is so unsubstantial that affirmance per curiam is obviously required: Is it within the authority of the United States District Courts, under the reviewing statutes, to annul and set aside orders of the Interstate Commerce Commission refusing to "grandfather" motor carrier applicants the right to withdraw prior to decision their permissive applications to the Commission for contract motor carrier permits?

The court below indicated that such right of withdrawal before Commission decision probably is substantive under the decision in *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1. In their motion to affirm counsel for the Government go further and now concede that the right of withdrawal of applications before decision is substantive under this Court's decision in that case. Contradictorily, however, both the court below and counsel for the appellees consider that the right of withdrawal *before* decision cannot be vindicated until *after* decision in view of *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125. That position is taken even though this Court in *Rochester Telephone* did not allude to *Jones* v. *Securities and Exchange Commission* in enumerating those administrative orders, negative in form, which may or may not be reviewed. The question of the reviewability of administrative orders denying the privi-

lege of withdrawing permissive applications before decision thereon appears purposely to have been left open by this Court in both those decisions.*

Yet here the Government contends that no substantial question is involved.

Far from being unsubstantial the question is both substantial and quite important now to be decided. In the majority opinion of this Court in *Jones* v. *Securities and Exchange Commission* the right of withdrawal of permissive applications to administrative bodies before decision was very positively and in comprehensive language sustained. The decision in that case went so far as to say that the mere filing of an applicant's request for withdrawal "terminated the proceeding". Refusal of the privilege of withdrawal before decision was denounced by the majority of this Court as "arbitrary and unreasonable".

If that be the present view of this Court there would certainly seem to be involved a very substantial question as to how the right of withdrawal before decision could be so emphatically expressed in that case by this Court and yet for it to be said that because of *Rochester Telephone* this important right of withdrawal *before* decision may not be vindicated in Court until *after* decision by the administrative bodies as to whether the permissive applications should be granted or denied. To withhold the right of judicial annulment of final administrative orders refusing the privilege of withdrawal of permissive applications *before* decision thereon would simply be tantamount to the destruction of such prior right of withdrawal itself. Also to say that after the administrative bodies shall have later granted the no longer wanted permissive applications the Courts then are available to set aside those orders because

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* Certiorari had been denied in that one of the two *Jones* cases not involving the feature of compulsory testimony. The lower court had held that the privilege of withdrawing Jones' application did not exist at all under the rules of the S. E. C. Therefore the refusal was held not reviewable because only procedural discretion was then thought to be involved.

the right of withdrawal previously had been refused is to suggest a strange and wasteful course of reviewing procedure.

To refuse the privilege of withdrawing permissive applications before decisions thereon is in itself an act of finality. It can never become more final than at the time of the refusal. If the right of withdrawal before decision is so far substantive that the mere request to withdraw "terminates the proceeding" and its denial is "arbitrary and unreasonable" it must be because the privilege of withdrawal *before* decision is itself a valuable and enforceable one. That value, whatever it may be in individual instances, cannot be preserved by compelling the applicant to forego the privilege itself until *after* the decision rather than before.

Just why it may be important to a permissive applicant to seek withdrawal before decision must of course be different in different cases. This Court appreciated that and set it forth in *Jones* v. *Securities and Exchange Commission*. It there was said that when requesting withdrawal of permissive applications before decision it was not necessary to give the real reason "or any reason at all" for making the request. That was a realistic attitude toward the obvious fact that business motives, sometimes confidential, are usually desired to be served. The value of the right to choose whether to go forward with the application or to withdraw it before decision would be frittered away by saying that not until after later administrative decision on the application itself may the courts be approached to vindicate the withholding of the privilege of prior withdrawal.

The decision in *Rochester Telephone Corporation* does not sustain the court below. True enough it was there and rightly declared that orders of these administrative commissions are not reviewable if their practical business consequence depends only upon some later administrative or judicial action. That broad determination rested upon *U. S.* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, and *U. S.* v.

Illinois C. R. Co., 244 U. S. 82. In the first of these the decision was that a mere valuation of railroad property did not, standing alone, withhold any privilege, subject the carrier to any civil liabilities, or determine any right. In the latter there was involved the reviewability of nothing more than an order of the Commission setting a case for hearing despite a challenge to its jurisdiction.

The present case does not resemble those. Here the privilege of withdrawal before decision of a permissive grandfather application is *itself* a right preserved by the Interstate Commerce Act—not in terms of course but inherently as said in *Jones*. Hence to refuse the withdrawal is to deny a "privilege secured by statute" existing at the time of the refusal. Such an order of refusal cannot later be made more final in its effect than when first issued. To deny before decision the privilege of withdrawal is to deny a right which at the time is substantive. The refusal cannot acquire either validity or more invalidity later on. Rightly considered *Rochester Telephone* in principle more truly sustains judicial authority over orders of that kind as soon as they may be issued. It there was clearly set forth that the courts are at once available when, without lawful authority, the Interstate Commerce Commission "withholds a privilege" conferred or recognized by statute. Here the privilege of withdrawal before decision is held by the court below to depend upon what may in fact prove to be the nature of the *later* decision by the Commission in the presently undisposed of proceeding before it.

Whether the reason or all the reasons for wishing withdrawal beforehand may be revealed or not *Jones*, unless and until reversed, makes the right of withdrawal before decision a substantive one at the time and was not said by this Court to be contingent on any later event.

Government counsel here offer the small concession that appellant is allowed by statute to continue its truck leasing business as long as its original grandfather application remains undecided. The insistence is that therefore no present injury results because of the refusal of the Com-

mission to permit the application now to be withdrawn. To that suggestion only this much need be said: Firstly, the grandfather application itself did not embrace appellant's truck leasing business so there is nothing left before the Commission upon which it could properly take later action. Secondly, if in any aspect it could be deemed that the truck leasing business of appellant is "protected" by the undisposed of grandfather application that could be so only upon the condition that the appellant would now have to comply in the meanwhile with all the regulatory provisions applicable to contract motor carriers. Its failure to do so must risk prosecution. While Section 309, U. S. Code, Title 49, provides for "continuance of such operation" pending determination of a grandfather application the right thereby conferred is conditioned upon compliance with all the regulatory requirements and assumes that the applicant will continue to press for the eventual issuance of a contract motor carrier permit. But before such a permit could be issued the Commission would have to find that the applicant is "willing * * * to perform the service of a contract carrier by motor vehicle". Here it is not.

Therefore the substantial question now before this Court is not whether appellant's truck leasing business is or is not within the regulative statute. Whether it be covered by the grandfather application or not appellant has elected to withdraw the application before decision and thus "terminate the proceeding".

For the Commission to grant an unwanted contract carrier permit would settle nothing. Appellant could ignore it and go on with its business. A permissive order granting a permit would not command anything to be done. Maybe appellant here would, in that event, be privileged to contest it in the way now being attempted in *Cornell Steamboat* v. *U. S.*, pending for argument in this Court (No. 384, present term) but it would not be compelled to do so. The appellant could disregard it and await some Governmental approach to the courts.

If, however, appellant's right of withdrawal before decision should now be vindicated by this court the Commission would still be at liberty to seek by injunction or indictment judicial determination whether or not the truck leasing business of appellant is subject to government control (Section 322(a)(b), U. S. Code, Title 49). No intervening motor carriers or shippers are urging that a contract motor carrier permit or a common carrier certificate of public convenience and necessity should be had by appellant.

Such in rough outline is the nature of the case and the substantial questions which it presents.

The Particular Facts

Enough of the facts in the case is here set forth merely to show how unreasonable and arbitrary the Commission's particular action appears to be.

Here the appellant filed with the Commission its grandfather application back in 1936 for a contract motor carrier permit under Section 309, U. S. Code, Title 49. At that time a few of its motor vehicles were being used by it in the conduct of a small contract carrier haulage business. The rest of its considerable number of vehicles were put out to shippers under long term leases. But its grandfather application was carefully confined to the small amount of contract carrier business then being done. While the much larger truck leasing business was revealed in the application no permit covering it was sought.

Concluding to discontinue its small contract motor carrier business appellant first approached the Commission with a motion to "dismiss" its grandfather application for that reason but to be conditioned upon some kind of expression from the Commission assuring that it did not deem appellant's leasing business subject to regulation.

No express action was taken upon that motion at the time. Instead, afterwards, and seemingly in regular course, the Commission set down the original grandfather applica-

tion for public hearing. Appellant then demonstrated on the record that it had by that time discontinued its former contract motor carrier activities and moved for "dismissal" of its application on that ground.

Responsively the Commission's Examiner, in a recommended report and order, determined that no contract carrier activities any longer existed and added the further view that appellant's truck leasing business was immune from regulation. He therefore recommended dismissal of the application.

Division 5 of the Commission, noting the absence of exceptions by any party to the proceeding, thereupon permitted the Examiner's order to go into effect as the order of the Commission.

Appellant consequently adjusted its business affairs to what it supposed was an end of the matter. No party to the proceeding sought reconsideration.*

Four months afterward, however, Division 5 of the Commission, on its own motion, entered an order revoking the previous order of dismissal and put the original grandfather application down for "further hearing". Appellant gratuitously accommodated by putting in further evidence as to the nature and extent of its large truck leasing business but renewed its insistence that no contract motor carriage for hire any longer was conducted.

Still later Division 5 of the Commission again for the second time reopened the record with reference to appellant's truck leasing business. Once more appellant accommodated by further showing as to its truck leasing business. But it then stiffened its position at that further hearing by a motion, later filed in writing, to "withdraw" the original grandfather application and for dismissal of it "for that reason".

In short the Commission has been persisting in the effort to take an old grandfather application covering a small

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* Certain motor carriers had previously intervened and urged denial of the appellant's grandfather application.

amount of contract motor carriage (long since discontinued) as an instrument through which to go into appellant's large truck leasing business (not covered by the application itself) presumably to determine whether it is or is not subject to the Act. No separate "investigation" under its general powers was ever entered by the Commission.

For sound and appealing business reasons appellant considers that the point has been reached when it is compelled in self-interest now to "terminate the proceedings" by its *withdrawal* of the application which the Commission has been using as a basis for its inquisition into the truck leasing business not covered by the application itself. Thereby at least this particular effort of the Commission will have been defeated.

Division 5 by order refused the right of withdrawal and the full Commission did likewise. This action followed.

Conclusion

It is fairly to be inferred that what the Commission here has in mind is first to reach some kind of decision of its own as to whether appellant's truck leasing business is subject to Commission regulation. Senior United States District Judge Knox in the Southern District of New York has lately held that appellant's business is not within the Interstate Commerce Act. (*Keegan, et al.* v. *John J. Casale, Inc.*, not yet reported, and arising under the Fair Labor Standards Act.) The Commission in other cases involving truck leasing businesses appears to be reaching out to claim the authority.*

It is however at liberty to present its point of view by bringing original action in the courts under Section 322 of

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* See *Shields Extension*, 41 M. C. C. 100; *Conner Hauling Co.*, 41 M. C. C. 404; *Murphy*, 34 M. C. C. 841; *Winkler*, 41 M. C. C. 845; *Steffen*, 34 M. C. C. 779; *Hamm*, 41 M. C. C. 852.

the Act (Section 322, U. S. Code, Title 49). It seems not to want to do so. Perhaps its thought is that by first making its own administrative declaration in a given case it would then be better fortified in court through some form of action which either it or the appellant would afterwards institute. It would thereby derive the benefit of a presumption of rightness of its own view of the matter rather than be required to vindicate its position by original injunction or indictment proceedings under Section 322.

It is respectfully submitted that appellant may not against its will be put in any such position by the Commission. It has the right to "terminate the proceedings" by its voluntary withdrawal of the old application which the Commission is improperly using as a basis for its own further purposes whatever they might be.

Respectfully submitted,

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In the District Court of the United States for the District of Delaware

Civil Action No. 337

JOHN J. CASALE, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

(Filed February 3, 1944)

Appellees, pursuant to Rule 12, paragraph 3 of the Rules of the Supreme Court of the United States, move that the decree of the district court be affirmed.

This is a direct appeal from the final decree, dated December 21, 1943, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208). In accordance with a written opinion of the court, this decree dismissed appellant's complaint, which sought to set aside an order of the Interstate Commerce Commission, on the sole ground that the suit was prematurely brought and that the specially constituted district court therefore at that stage

lacked jurisdiction over the subject matter. This order, issued May 14, 1943 by Division 5 of the Commission,[1] dismissed appellant's petition to dismiss its application under the "grandfather" clause of Section 209 (a) of Part II of the Interstate Commerce Act (49 U. S. C. 309 (a)) for a permit to operate as a contract carrier by motor vehicle. An appeal to the Supreme Court was allowed on January 17, 1944, and service of the appeal papers was made upon appellees on or about January 20, 1944.

The case was heard by the district court on the pleadings, various documents, and an agreed statement of facts. From these, the following facts appear:

On February 12, 1936, appellant filed an application with the Interstate Commerce Commission for a "grandfather" permit as a contract carrier by motor vehicle as provided in the statute. In the application, appellant stated that while it carried some freight under contract, its chief business was leasing trucking equipment to shippers and others for the transportation of freight in interstate commerce. On March 29, 1939, appellant filed with the Commission a motion to dismiss its application and an accompanying memorandum in support of the motion in which it was

[1] On August 2, 1943, the full Commission denied appellant's petition for reconsideration of the action of Division 5.

stated that appellant intended to give up all carriage for shippers and to concentrate on the business of leasing equipment to them. There was attached a copy of the proposed leasing agreement which appellant stated it intended to use. Its motion contained the following prayer:

> Applicant respectfully prays that the Commission make and enter an order dismissing its said application conditioned upon the discontinuance of any and all forms of relationships with shippers other than such as may be caused by such form of rental agreement and that the Commission declare to applicant that upon the adoption of that form of rental agreement exclusively, and notification to the Commission to that effect its said application shall be dismissed.

And in the memorandum, appellant stated:

> It is believed that with this reorganization applicant will cease to be a motor carrier for hire if it is such at this time. It seeks, however, determination of that conclusion by this Commission as a condition precedent to the dismissal of its grandfather application and surrender of any right it may have to a permit or certificate. The Commission therefore is respectfully asked to express itself on the matter to the end that applicant may promptly proceed to the negotiation of the new contracts and upon advising the Commission thereof, receive an order dismissing its grandfather application.

On June 11, 1941, certain competing carriers intervened in the case and filed protests in opposition to the granting of a permit to appellant. On June 17, 1941, a hearing was held before an examiner of the Commission, at which appellant offered evidence regarding details of its leasing business. On October 24, 1941, the examiner filed a recommended report finding that appellant was engaged only in the rental business and that this business did not constitute carriage subject to the Act. It was therefore recommended that the application should be dismissed. The Commission, however, on its own motion reopened the case, and further hearings were held before an examiner on October 2, 1942, and April 3, 1943. At the second hearing, appellant moved for unconditional permission to dismiss its application. The same motion was repeated in writing on April 9, 1943. This last motion was then denied by the Commission in its order of May 14, 1943, attacked in the present suit. Appellant asked the court to set aside the order and to restrain the Commission from proceeding further in respect to its application.

The district court found it unnecessary to consider whether the Commission's action on the merits was wrongful, because of its conclusion that at the present stage of the proceedings it lacked jurisdiction to review the Commission's

order.[2] Only the correctness of this jurisdictional determination is here in issue, and it is plain that this question was properly decided. Furthermore, the decree of the district court should be affirmed without argument because the appeal therefrom presents no substantial question.

1. The present order of the Commission, as the district court concluded, falls squarely within the first category of administrative orders held not reviewable under the Urgent Deficiencies Act in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. Thus, it is not a final order, but, in the words of that case (307 U. S. 125, 130, 143), an order which "does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action," and represents merely "a stage in an incomplete process of administrative adjudication."[3] The situation here is exactly like that in *United States* v. *Illinois Central R. Co.*, 244 U. S. 82 and *United States* v. *Los Angeles & S. L. R.*

[2] The Supreme Court has jurisdiction to review the district court's jurisdictional ruling. *United States* v. *Corrick*, 298 U. S. 435, 440.

[3] The Court pointed out that one of the reasons for holding orders in the first category nonreviewable, was the following (307 U. S. 125, 131):

"Partly they are an aspect of the procedural philosophy pertaining to the federal courts whereby, ever since the first Judiciary Act, Congress has been loath to authorize review of interim steps in a proceeding."

Co., 273 U. S. 299, cited by the Supreme Court in the *Rochester case* (307 U. S. 125, 130–131) as illustrative of the first category. In the *Illinois Central* case, the Supreme Court held not reviewable an order of the Commission setting a case for hearing despite a challenge to its jurisdiction. In the *Los Angeles & Salt Lake* case, it was held that a final valuation order of the Commission was not reviewable under the Urgent Deficiencies Act. The order there before the court was described in the following language, which is applicable to the order here (273 U. S. 299, 309–310):

> The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. * * *

Here, just as in those cases, the Commission's order can have no present effect upon appellant's operations. The present order does not determine appellant's carrier status at all. As the district court observed, "a denial of the motion to dismiss does not call upon plaintiff for anything more, forbid it to do anything, or put it under any burden while the case is in the lap of the Commission." The Commission's proceedings, if al-

lowed to run their orderly course, will ultimately culminate in a final order that appellant is or is not a carrier subject to the Act and is or is not entitled to a permit. Any such order adverse[4] to appellant, will be reviewable *in toto*[5] in appropriate proceedings under the Urgent Deficiencies Act.

2. Particularly analogous here, and supporting the district court's decision that it lacked jurisdiction in view of the present posture of the proceedings, is *Jones* v. *Securities and Exchange Commission*, 79 F. (2d) 617 (C. C. A. 2), certiorari denied, 297 U. S. 705. There the petitioner had filed with the Securities and Exchange Commission a registration statement, which he was required to keep on file in order lawfully to

[4] In view of appellant's contention that it is not subject to the Commission's jurisdiction at all, any order holding to the contrary would be adverse to appellant, even though the Commission should at the same time grant appellant's application for a permit under the "grandfather" clause. Even a final order of the latter type would be reviewable under the Urgent Deficiencies Act. Thus, in *Cornell Steamboat Co.* v. *United States* (S. D. N. Y., Civil No. 21–35, decided August 2, 1943, unreported), a three-judge district court reviewed and sustained a Commission order granting the plaintiff's application for a "grandfather" certificate as a common carrier by water and overruling its contention that it was not a carrier subject to the Act. This case is now on appeal on the merits to the Supreme Court (No. 384, present Term).

[5] The district court stated that such a review on the merits would include the question of whether appellant had a substantive right to have its application dismissed at its pleasure after hearings had taken place.

offer securities for sale. After the Commission had instituted proceedings to suspend the effectiveness of this registration, the petitioner filed a motion to withdraw the registration statement. The Commission's order denying this motion was held by the circuit court of appeals not to be a final order judicially reviewable under the prescribed statutory appellate procedure.[6] Decisions involving jurisdiction under the Urgent Deficiencies Act have been recognized as "persuasive analogies" in resolving jurisdictional issues under various other statutory appellate schemes. *Federal Power Commission* v. *Metropolitan Edison*

[6] After denying the motion to withdraw the registration statement, the Commission successfully instituted proceedings before the district court for an order requiring petitioner to appear before the Commission's examiner and give evidence concerning the registration statement. These proceedings were consolidated in the circuit court of appeals with petitioner's direct appeal from the Commission's order dismissing his motion. The decision of the circuit court of appeals also affirmed the district court's holding granting the Commission the order sought. Only the latter phase of the case was considered by the Supreme Court on certiorari in *Jones* v. *Securities Commission*, 298 U. S. 1, certiorari having been denied as to the phase of the case relating to petitioner's statutory appeal (297 U. S. 705; 298 U. S. 1, 14). While the Court, in the course of its decision reversing the circuit court of appeals, recognized that petitioner had the substantive right to withdraw his registration statement with the Commission, this does not militate at all against the correctness of the conclusion of the circuit court of appeals that it lacked jurisdiction on petitioner's direct appeal to review the Commission's order refusing permission to withdraw.

Co., 304 U. S. 375, 385. Presumably, the converse is equally true.

3. This order, even if it were otherwise an order reviewable under the Urgent Deficiencies Act, is not reviewable here for the further reason that the complaint does not state a cause of action in equity, either by proof of irreparable injury or otherwise. It was suggested by the Supreme Court in the *Rochester Telephone* case (307 U. S. 125, 136) and definitely held more recently in *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 415, that a suit cannot be maintained under the Urgent Deficiencies Act unless the complaint states a cause of action in equity. As previously indicated, the present order of the Commission has absolutely no present effect upon appellant in the conduct of its business. It is impossible now to foretell whether the ultimate order of the Commission will be adverse or favorable to appellant. Appellant, having a "grandfather" application on file with the Commission, can continue its present operations at least until the final order of the Commission, without threat of either civil or criminal proceedings by the Commission.[7] If the ultimate decision is unfavorable, appellant will have an adequate remedy under the Urgent Deficiencies Act. It is well

[7] Section 209 (a) of the Act (49 U. S. C. 309 (a) provides that "pending determination of any such application, the continuance of such operation shall be lawful."

recognized that the existence of a clear and adequate alternative procedure for having certain issues determined deprives an equity court of jurisdiction to determine them. *Cavanaugh* v. *Looney*, 248 U. S. 453, 456; *Hurley* v. *Kincaid*, 285 U. S. 95, 104; *California* v. *Latimer*, 305 U. S. 255, 260.

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

(s.) CHARLES FAHY,
Charles Fahy,
Solicitor General.

(s.) DANIEL W. KNOWLTON,
Daniel W. Knowlton,
Chief Counsel,
Interstate Commerce Commission.

FEBRUARY 1, 1944.

Certificate of Service

I hereby certify that I served a copy of the attached Motion to Affirm upon the following counsel for appellant, by mailing him a copy thereof this first day of February, 1944: Charles M. Cotterill, Esquire, 70 East 45th Street, New York 17, New York.

Robert L. Pierce,
Robert L. Pierce
Special Assistant to the Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1944

No. 704. JOHN J. CASALE, INC. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the District of Delaware. March 6, 1944. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States* v. *Illinois Central R. Co.*, 244 U. S. 82, 89; *Federal Power Commission* v. *Edison Co.*, 304 U. S. 375, 384–5; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 130. *Mr. Charles E. Cotterill* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for appellees. Reported below: 52 F. Supp. 1005.